No. 84-1070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Washington

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

I

RESPONDENT HAS GONE OUTSIDE OF THE RECORD TO RAISE NEW ARGUMENTS PREDICATED ON FACTS NOT IN EVIDENCE OR OTHERWISE CONSIDERED BY THE COURTS BELOW.

Making a remarkable about-face from its position taken in the Brief in Opposition to the Petition for a Writ of Certiorari,[1] the Department of Services for the Blind

[1] In the Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, its position was that the state supreme court correctly reasoned from and applied this Court's Establishment Clause decisions. See, Brief in Opposition, at 6-11. Respondent concluded its argument saying: "Under all of the principles enunciated by this court, the state supreme court properly determined that Mr. Witters' request for financial assistance should be denied." *Id.* at 11.

now, in effect, concedes that the Washington Supreme Court's decision on the federal Establishment Clause in this matter was based on erroneous reasoning.[2] Respondent defends the result below, but abandons the reasoning which led to the result.

Respondent's new arguments, raised for the first time in this Court, are predicated on an essential fact which is nowhere to be found in the record of this case and which no court below considered in any fashion whatsoever.

> In respondent's brief at 3 it says:
>
> The vocational rehabilitation program at issue is a federally funded program (Pet. App. C-2, J. App. 7). The federal funding is pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 720, *et seq.*, which provides grants to states "to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." 29 U.S.C. § 720(a).

Nowhere in the record below is it established or even asserted that "the federal funding is pursuant to the Rehabilitation Act of 1973." The source of the federal funding is a factual proposition which must be established by competent evidence and must be included in the record below. Many federal programs exist which share revenues with the states for a variety of educational and social service purposes. There is no proof in the record that the federal money which funded this program is from the Rehabilitation Act of 1973.

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[2] See, e.g., Brief for Respondent at 16-17 where it says: "While we believe the court below was correct in denying the petitioner relief on the basis of the second prong of the *Lemon* test, *viz.*, the "effect" prong, we differ with that court as to the proper approach which should be taken in applying the prong.

We will later demonstrate that even if this fact is somehow properly before this Court, respondent's arguments predicated thereon are without merit. Nonetheless, the belated assertion of this unproven proposition is a ploy to which we take strong exception.

This Court held as early as 1797 that "[i]n some shape, the facts must be made to appear in the record. . . ." *Jennings* v. *Perserverance*, 3 U.S. (3 Dall.) 336, 337 (1797). Unable to defend the rationale of the decision below, respondent asks this Court to go outside the record despite the fact that "[i]t has been repeatedly ruled in this Court that we can look only to the record to ascertain what was decided in the court below." *Davis* v. *Packard*, 32 U.S. (7 Pet.) 276, 282 (1833).

The respondent, dissatisfied with the reasoning below, seeks this Court to revise the lower court decision. However, respondent has not built the predicate facts into the record which it claims are essential for the ruling it requests of this Court. The admonition given by this Court in *Suydam* v. *Williamson*, 61 U.S. (20 How.) 427 (1857) is equally applicable today.

> When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequences of his own neglect.

61 U.S. at 433.

The facts which were actually established below and which are in the record are that the program was funded with approximately 80 percent federal funds and 20 percent state funds. J.A. 7. The exact source of those federal

funds is not established in the record. This is no small matter because the respondent attempts to rescue its entire case on procedures which it claims are mandated by the Congressional Act and the federal regulations based thereon.

We do not dispute the existence of the Rehabilitation Act of 1973, nor do we challenge the existence of the regulations promulgated under said Act. However, we do take strong exception to the predicate fact which would give these regulations an arguable relevancy to this case—there is no proof in the record that the federal funds in question are from said Act.

Asserting this matter for the first time at this stage of the proceeding puts petitioner in a terribly unfair position. It also leaves this Court in a difficult situation. We are told what the Act and regulations provide, but there is no opportunity to explore the factual workings of said federal program to gather the necessary evidence to see how the program really works. If respondent would have asserted this factual proposition at a stage of the proceeding which would have allowed petitioner an opportunity to respond, we could have put a great deal of evidence into the record which would, we believe, totally nullify the effect of the respondent's new arguments.[3]

The Washington Attorney General concedes that he is in a somewhat unusual position by arguing in this Court

[3] Even writing this brief puts us in a very difficult position without going outside the record ourselves to meet this new factual assertion and new arguments predicated thereon. We have discovered new evidence which directly undermines the respondent's arguments about how the program really works. We include the gist of this information in this footnote, but we do not ask that this Court consider it as evidence in any way. We include it as a hypothetical example of the kind of evidence which we could possibly have gathered and introduced if this issue had been properly raised by the respondent early on in this proceeding.

"Hypothetically" we could prove that the State of Florida's Department for the Blind administers a program with funding from the same federal program which the State of Washington claims as its source of federal funds. Again, "hypothetically" we could prove that the Florida program has funded many people to study for the ministry. We could "hypothetically" prove that the Florida program evaluates a blind person's suitability for a course of training in the ministry by simply taking the person's academic record and test scores to the college which the blind person desires to go to and asks the dean to evaluate this person's chance for academic success based upon their experience with persons with similar academic records. This is, at least "hypothetically," the exact same procedure used in evaluating students who want academic training for any other career. Furthermore, in Florida in order to evaluate the prospects of job placement for the ministerial student, we could "hypothetically" prove that the vocational counselor simply asks the college for its record of placement of individuals in that career field, the same criteria used for all other career choices.

that his own statute is unconstitutional under the federal Establishment Clause.[4] However, by its new argument the Attorney General of Washington State now not only says his state statute is unconstitutional, for the first time he now implicitly argues that the federal statute which funds the state program is also unconstitutional.

Respondent concedes that the federal program does not exclude ministerial students from participation therein.[5] The Attorney General of Washington argues that certain aspects of the federal program require the State of Washington to administer its program in a way that violates the Establishment Clause. Without saying it directly, the State of Washington now is arguing that the federal program, 29 U.S.C. § 720 *et seq.*, is unconstitu-

[4] See, Brief of Respondent at 5.

[5] See, Brief of Respondent at 10.

tional. In order to keep one blind man from participating in a vocational rehabilitation program, the State of Washington Department of Services for the Blind is asking this Court to void a federal program which is apparently working well in the 49 other states.

The United States Department of Justice would have undoubtedly had the right to participate in the factual development of this case to demonstrate the full and true workings of this federal program if there had been any prior notice that the State of Washington intended to challenge the constitutionality of the federal program.

Surely, this kind of a belated, back-door challenge to the constitutionality of an Act of Congress cannot be permitted to be raised for the very first time in a brief of a respondent in this Court.

Petitioner has, from the very first stage, argued that decision to preclude him from participation violated the provisions of the First Amendment to the United States Constitution. He has argued at every stage that if the state constitution is construed to deny him the access to the program, then the state constitution is in violation of the federal constitution. The Attorney General of Washington surely should be charged with the foresight that a person who raises such arguments may eventually seek to have his case adjudicated in this Court. The Attorney General should not now be permitted to complain that the case has taken unexpected twists and turns which necessitate raising new evidence, new arguments, and a new *sub silento* challenge to the constitutionality of a federal statute. The record has been made. It is too late for this type of tactic.[6]

[6] We also take strong exception to the effort of the Anti-Defamation League of B'nai B'rith to go outside the record to supplement the facts to bolster its arguments. A letter of May 16, 1985, from David R. Minikel, Counsel for the Washington Department of Services for the Blind, to the Anti-Defamation League is appended to the ADL brief. The ADL then uses language from that letter to assert the "fact"—not in the record—that the aid directly flows to Inland Empire School of the Bible rather than to Mr. Witters. This kind of self-serving manipulation of the record should not be countenanced. The ADL brief should be ignored if not stricken.

II

EVEN IF RESPONDENT IS ABLE TO RAISE NEW ARGUMENTS ON NEW FACTS, THEY ARE WITHOUT MERIT

A. Respondent's New Arguments Give No Basis For Determining That The Primary Effect Of The Program Is To Advance Religion.

Respondent takes several pages of its argument to expound for the first time upon the "Nature of the Vocational Rehabilitation Program for the Blind." See, Brief of Respondent, at 10-16.[7]

Assuming that this line of argument is somehow properly before this Court, the arguments which are derived from this newly expanded factual base still fail to demonstrate any constitutional prohibition against a

[7] Respondent ends this section with a caustic comment that "petitioner fail[s] to comprehend the nature of the program. . . ." See, Brief of Respondent, fn. 9, p. 16. Our arguments which give rise to this critique are totally accurate based upon the record of the case. Our "failure to comprehend" is due solely to the fact that we have chosen to rely on the record of this case. Based upon that record, it is without dispute that our original brief was absolutely correct when we said: "The choices as to which school to attend and which career to pursue are entirely up to the blind individual. No agency of the state has the power to influence that choice." Petitioner's Brief at 20. Respondent has been in a superior position all along to know the "true" nature of the program. Respondent cannot be allowed to withhold such information until it suits its purpose to dole out another bit of information concerning the "nature of the program." The state is trying to play a shell game with a blind man.

blind ministerial student participating in the federally funded, state administered program.

Respondent places its primary reliance for its "primary effect" argument, not on decisions of this Court, but on the theories of Harvard's Professor Laurence Tribe as expressed in his 1978 textbook for law students on constitutional law. See, Brief of Respondent at 17, citing Tribe, *American Constitutional Law* (1978). According to the seven-year-old passage cited from Professor Tribe, this Court's position has "shifted" from the language of *Lemon*, and has "come closer to the absolutist no-aid approach to the establishment clause than the primary effect test did." *Id.*, Tribe at p. 840.

It is fair to wonder if even Professor Tribe still believes that this Court has embraced the "absolutist" position in light of its decisions in *Lynch* v. *Donnelly*, ___ U.S. ___, 79 L.Ed.2d 604 (1984); *Marsh* v. *Chambers*, 463 U.S. 783 (1983); and *Mueller* v. *Allen*, 463 U.S. 388 (1983). Certainly this Court has demonstrated that it does not read the Constitution in an "absolutist" manner with regard to the Establishment Clause.

Respondent suggests that by the state involvement in counseling a blind individual on a possible career choice as a minister, the "imprimatur of state approval" comes to rest on the blind person's career, thereby violating the "primary effect" test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

The record discloses no such factual pattern in this case. Who chose a ministerial career for Witters? He did. Who chose the school in question? He did. It strains the imagination to believe that any state counselor would actually initiate a suggestion that a blind person might become a minister. Although, the allegedly applicable federal program requires state cooperation and approval

of the choice of career, it is no different than the kind of government approval involved in approving a church's building permit.

A government building permit administrator might have to involve himself in discussions about how many pews are going to be located in sanctuary. The government agent might have to advise the church on where to place its baptistry to avoid a potential safety problem. The government agent might even have to be involved in deciding whether a congregation can even build a church building at all on the property in question because of zoning laws.

Does the government's approval of a church's choice of pews, location of a baptistry, or its decision to build represent an impermissible "imprimatur" of government approval on that church? We think not.

The role of the counselor in this case is no different. As to the qualifications of the person for the ministry, the counselor can apply an objective, secular standard, to wit; "Does the person have the academic background which would predict success with this level of college education?" This could be done by comparing the would-be ministerial student's grades and test scores with others who have been admitted for similar training. This is no different than what is done for a blind person who wants to be a teacher or lawyer.

Just as a government building inspector uses objective, secular criteria to evaluate both church sanctuaries and civic auditoriums, so too, a vocational counselor may use similar objective, secular criteria to evaluate potential ministers, teachers, and lawyers.

There is no "religious" choice to be made by the government counselor. His sole objective is to determine if the person has the academic prowess to succeed in the pro-

posed course of study. There are no religious decisions to be made by the counselor which "inhere in the situation" as suggested by respondent.

The same is true as to the assessment of the availability of employment for ministers. Surely it is not unconstitutional for the Department of Labor to gather statistical data on the number of persons employed in religious careers. Does the imprimatur of government approval rest on religion when the government gathers such information? Not even Professor Tribe would argue that. If it is not impermissible to gather employment statistics for persons in religious careers, why is it impermissible for a vocational counselor to look at such information to find out how many jobs in that category exist in his state? What is unconstitutional about a government counselor going to a church college and asking for statistical information about the placement record of the school for students who desire to become ministers? It is no different than asking a church for information on the number of persons in church on Sunday to measure the adequacy of building exits or parking spaces.

It does not violate the Establishment Clause for a government agent to merely talk to a church-related institution about wholly secular data. No imprimatur of state approval results from a government agent's approval of either a church building plan or a blind man's career plan.

B. Respondent's New Evidence And New Arguments Do Not Demonstrate Excessive Entanglement Of The State With The Church.

The new arguments raised by respondent are more properly dealt with under the "excessive entanglement" prong of the *Lemon* tri-partite test than under the "primary effect" test. However, the failure of respondent to

build his record to demonstrate the unconstitutionality of the program under this prong was specifically pointed out by the Washington Supreme Court.

> The three-pronged "entanglement" inquiry is ill-suited to this case. In addition, the administrative and trial court records do not provide an adequate factual basis to make the type of inquiry contemplated by the Supreme Court.

C.P. A-12.

Who had the duty to put such factual information in the record? The party who wished to argue that the program was unconstitutional. Witters has argued all along that his participation is not barred by either the state or federal constitution. It was up to the Attorney General of Washington to build such a factual record if he wished to make such an argument.

In any event, the analysis we have just made with respect to the "imprimatur" of state-approval applies with equal force to the state's "new and improved" excessive entanglement argument.

The posture of the respondent is that any involvement of the state with a religious institution *ipso facto* constitutes excessive entanglement of the state with the church. The state is no more entangled with a religious institution in this kind of situation than it is, as we have argued, when it considers and approves church building permits.

However, even with new facts and new arguments respondent fails to come to grips with the fact that in this case the state is not entangled at all with religious institutions. The state's involvement is with Witters, not a religious institution. There is no "excessive entanglement" holding ever entered by this Court where a pro-

gram was ruled unconstitutional because the government became too entangled with a religious individual.

Ministers are allowed certain tax advantages under the Internal Revenue Code. Does it constitute excessive entanglement by the IRS to gather information from a person claiming the right to such treatment to ascertain that he is indeed a minister and that his actual employment is of a religious nature? It has never been so held by this Court. Interaction between the government and a religious individual has never been considered to violate the excessive entanglement prong or any other prong of the Establishment Clause test as interpreted by this Court.

This long-standing practice of government interaction with ministers under the IRS Code is clearly a more comparable situation to this case than the facts in *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982). In that case this Court held that granting a church absolute veto power over a liquor license gave the church, in essence, the right to make a governmental decision. In this case no religious institution has any power to make a governmental decision. Nor does the state have the power to make a religious decision. The decision which the state has to make is simply: Will this person become employed if he pursues the career he has chosen? There is nothing religious or entangling about such a determination.

III

THERE IS NO REASON THIS COURT SHOULD AVOID THE FREE EXERCISE ISSUE

There is one point about which petitioner and respondent agree. Both sides have argued that the Free Exercise issue is ripe at this stage of the proceedings and there is no rationale for remanding this case to the state supreme court.

It is the suggestion of the Solicitor General that such a course of action be pursued. The Solicitor cites no authority to bolster his argument that the case should be remanded for a determination of the state constitutional issues before this Court reaches the Free Exercise Clause issue.

The posture of this case is no different in this regard than that in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In that case the argument was raised that the Missouri Constitution required a stricter separation of church and state than was required by the federal Constitution. There was no definitive ruling by the Supreme Court of Missouri that its state constitution actually required the prohibition of religious student groups on its state college campuses. The lack of a determination of the state law issue in *Widmar* was not seen by this Court as a reason to merely vacate the lower court's decision on the Establishment Clause and remand for a decision on the state constitutional issue before deciding the substantive issues under the Free Speech and Free Exercise Clauses.

As in *Widmar*, there is little doubt here as to how the state supreme court would decide the state constitutional issue. The lower court has already said in this case:

> Since our state constitution requires a far stricter separation of church and state than the federal constitution (see *Weiss* v. *Bruno*, 82 Wn. 2d 199, 509 P.2d 973 (1973)), it is unnecessary to address the constitutionality of the aid under our state constitution.

C.P. at A-2.

The practice followed by this Court in *Widmar* should be applied again to this case. The Court took the word of the attorneys for the State that the state constitution would preclude the students' right to equal access on the college campus. This was especially appropriate in light of

the prior decisions of the Missouri supreme court which seemed to signal such a result.

We have a much clearer signal here. If the state supreme court did not decide that the state constitution would preclude aid to Witters, they dropped an anvil-like hint to that effect.

There is no prudential reason for delaying a decision on the free exercise issue. A remand would not serve any notion of judicial economy for it is a virtual certainty that the decision on remand will only require this Court to consider it all again in a year or two.

Meanwhile, it should be noted that the respondent correctly points out that Witters is legally blind from a progressive eye disease which is expected to result in total blindness. At this point he can still see enough to read, making his training much easier and much less costly for the state. If this case must go back for a remand his situation might not permit such a possibility a year or two from now.

IV

PETITIONER'S FREE EXERCISE RIGHTS ARE VIOLATED IF HIS RELIGIOUS CAREER DISQUALIFIES HIM FROM A PROGRAM FOR WHICH HE IS STATUTORILY ELIGIBLE

Respondent's argument on the Free Exercise Clause is easily answered. Respondent contends that this situation is analogous to *Harris* v. *McRae*, 448 U.S. 297 (1980). In that case certain persons claimed that their constitutional right to choose an abortion was denied by a legislative determination by Congress not to fund certain types of abortion procedures under Medicaid programs. This Court held that the constitutional right to choose an abortion did not give rise to an auxiliary right to require the

government to pay for it when the legislative body had not chosen to fund it.

That is simply not the situation here. We admitted in our opening brief that this case would be substantially more difficult if the Washington legislature had chosen to exclude ministerial students from participation in the program. Respondent concedes, as it must, that neither the state legislature nor Congress decided to exclude ministerial students from eligibility in this program.

The legislative judgment here was to include Witters. We do not argue on these facts that the legislature must be required to fund Witters program against its will by virtue of the Free Exercise Clause.[8]

This Court said in *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981) that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available government program." Thomas may not have had a constitutional right to unemployment compensation if the legislature had not decided to enact such a program, but once they did enact such a program, he could not be excluded solely because of his exercise of his religion. Witters may not have a constitutional right to government funding of vocational rehabilitation if the legislature did not enact such a program which made him eligible, but like Thomas, he may not be excluded by the courts simply because of the exercise of his First Amendment right to exercise his religious faith by studying for the ministry.

---

[8] We question whether the state legislature would be allowed to make such a judgment under the federal Supremacy Clause given the fact that the program is federally funded at least 80 percent. Congress did not exclude ministerial students. This Court need not speculate on the outcome of a case where Congress authorized such funding and the state legislature decide to exclude ministerial students. Here Congress and the state legislature are in agreement.

CONCLUSION

Petitioner respectfully prays that this Court reverse the decision of the Washington Supreme Court which held that the federal Establishment Clause prohibits his participation in the vocational rehabilitation program. Petitioner further prays that this Court rule that his right to the Free Exercise of Religion has been violated by his exclusion from the rehabilitation program, since he met the statutory criteria for participation.

Respectfully submitted,

MICHAEL P. FARRIS
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October 30, 1985

CERTIFICATE OF SERVICE

MICHAEL P. FARRIS, counsel of record for petitioner, hereby certifies that he sent three copies of the foregoing Petitioner's Reply Brief to counsel of record for Respondent, Kenneth O. Eikenberry, Attorney General, Philip H. Austin, Senior Deputy Attorney General, Timothy R. Malone, David R. Minikel, Assistant Attorney General, Temple of Justice, Olympia, Washington, 98504, by Federal Express next day delivery on this 30th day of October, 1985. I further certify that I sent one copy of said brief by regular first class mail to each of the following counsel of record for Amici Curiae for both sides:

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